

## ESSAY

# FROM GEORGE CARLIN TO MATT DRUDGE: THE CONSTITUTIONAL IMPLICATIONS OF BRINGING THE PAPARAZZI TO AMERICA

LYLE DENNISTON\*

In every age of American history, someone is bound to find reason—perhaps many reasons—to criticize the performance of the nation's press. Lately, the critics have returned with a vengeance; we in the business are catching hell again, and it is a particularly searing kind of hell.

Unlike the learned professions, the press is a social institution which operates without a commonly shared perception of proper conduct, and it has a quite well-developed capacity to “live and let live,” ethically speaking. And that, from time to time, breeds contempt and ridicule, because critics feel themselves entirely competent to say what is proper, journalistically. In this era of Paula Jones,<sup>1</sup> Monica Lewinsky<sup>2</sup> and Kathleen Willey,<sup>3</sup> the press is nowhere near to

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\* Supreme Court Reporter, *The Baltimore Sun*. The author is indebted to Jonathan D. Wallace for his research and analysis in *The Specter of Pervasiveness: Pacifica, New Media, and Freedom of Speech*, CATO INST. BRIEFING PAPERS No. 35 (Feb. 12, 1998) (on file with *The American University Law Review*). This Article is adapted from remarks prepared for the annual banquet of the *American University Law Review*, Washington, D.C., April 4, 1998. Some of the thoughts were expressed earlier in a presentation to the Maryland-Delaware-D.C. Press Association, Baltimore, Maryland, February 26, 1998.

1. Paula Jones alleged that President Clinton, while governor of Arkansas, exposed himself and asked her to perform oral sex. Her suit was subsequently dismissed by Judge Susan Webber Wright and Jones has since appealed the ruling to the Eighth Circuit. See Peter Baker & Susan Schmidt, *Clinton Pledges to Testify “Truthfully”*, WASH. POST, Aug. 1, 1998, at A1.

2. President Clinton is accused of having an affair with former White House intern Monica Lewinsky and later urging her to lie under oath. See Dan Balz, *President Endures Embarrassing Week: Document Dump Adds Lurid Details*, WASH. POST, Mar. 15, 1998, at A1.

3. Kathleen E. Willey claimed that she was also a victim of an inappropriate sexual ad-

meeting the levels of propriety that large segments of the public tend to believe should be the absolute minimum.

Of course, it is difficult for the press' critics to understand, and impossible for them to accept, that the fusty *New York Times* can live in contended coexistence with the smart-aleck *New York Post*, and that neither is particularly uncomfortable sharing a newsstand with the rambunctiously inventive *National Enquirer*. Similarly, CNN has no difficulty sharing the same ozone layer with "Hard Copy," and Tom Brokaw does not necessarily mind sharing it with Maury Povich. And *washingtonpost.com* is not about to move out of its cyberneighborhood just because Matt Drudge works nearby. Those members of the press, and others, believe they can tell the difference between themselves and others. Adapting a wonderful phrase of Justice Potter Stewart, we may not be able to describe adequately how each of us is different, but we think we know it when we see it.<sup>4</sup>

Most of the time, the press will not be overly concerned with what its critics are complaining about; if the press is concerned, it often chooses to feign indifference. Perhaps, then, it would not be particularly surprising if the press were paying no attention to the latest blast of criticism.

The press, however, does not always turn away from its critics with disdain or a deaf ear. On occasions—concededly, they are rare—the press grows fretful about itself, wondering if, maybe, its critics are right. The press is going through one of those phases now, suffering some quite noticeable spasms of self-doubt.

Just the other day, for example, a perceptive reporter for *The Washington Post*, Dan Balz, wrote about how, in covering the current sex scandals surrounding the White House, "the media [has] waded into areas of private behavior, more often with enthusiasm than with embarrassment."<sup>5</sup>

And recently, the American Society of Newspaper Editors ("ASNE") made the credibility of the press the central theme of its annual convention in Washington.<sup>6</sup> Agents of the Fourth Estate

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vance by President Clinton in the White House. See Michael Isikoff, *A Twist in Jones v. Clinton: Her Lawyers Subpoena Another Woman*, NEWSWEEK, Aug. 11, 1997, at 30.

4. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (stating that "I shall not today attempt further to define the kinds of material I understand to be embraced within that short hand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .").

5. Dan Balz, *The Legal Battle; Many Had Role in Case's Escalation*, WASH. POST, Apr. 3, 1998, at A33. See Dan Balz, *A Crisis With No Parallel; Clinton Scandal Fits Coarser, Faster-Paced '90s*, WASH. POST, Jan. 26, 1998, at A1 (noting that the recent White House scandal "reflects a new media environment in which competitive pressures are more intense than ever and the lines between traditional and tabloid journalism have been badly blurred").

6. See John Leo, *Elephant in the Living Room*, U.S. NEWS & WORLD REP., Apr. 20, 1998, at 18

seemed somewhat ready to believe that it has lost credibility, and that the press must do something to regain it. ASNE's president, Sandra Mims Rowe said: "If this is a time when the destructiveness and lawdriness of mass media hang like a curse over even the best-intentioned newspaper editors, it is also a time when changing values and new media players should prompt us to seek higher ground."<sup>7</sup> She suggested that "other media that do not share newspaper standards are recasting the definition of news."<sup>8</sup>

Ms. Rowe thus could not protest too convincingly when, at that same meeting, Larry Sabato, a University of Virginia political science professor and critic, uttered the most extreme criticism: "Lowest common denominator journalism has now become the norm. The war for higher standards is over."<sup>9</sup>

In the same week that the ASNE was meeting to agonize over media credibility, there was another indication of slippage in media standards. Stuart Taylor, a prominent Washington journalist and television media "star," suffered what most journalists would interpret as a serious crisis in professional credibility. It was revealed that, while writing highly critical columns about President Clinton and the White House sex scandal for the *National Journal*, Taylor was negotiating to join the staff of Independent Counsel Kenneth Starr, who, of course, was investigating that very scandal.<sup>10</sup> After pondering the temptation, Taylor declined the offer and chose not to reveal his conflicted role.<sup>11</sup>

Whatever damage, short-term or lasting, that may have resulted for Taylor's reputation, it certainly added to the aroma of illegitimacy

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(noting that the American Society of Newspaper Editors had begun a million dollar "credibility project" to examine whether people distrust the newspaper industry, and if so, what can be done about it).

7. Felicity Barringer, *Testing of a President: The News Organizations; Wild Rumor, Real News & Credibility*, N.Y. TIMES, Apr. 2, 1998, at A20. Sandra Mims Rowe, an editor with *The Oregonian* of Portland, retired from her position as ASNE's president on April 3, 1998. Edward L. Seaton, the publisher and editor-in-chief of *The Manhattan Mercury* of Kansas, was named the new president at the ASNE's annual convention. See *Briefing*, DENVER POST, Apr. 4, 1998, at C2 (announcing new president of ASNE).

8. See Walter R. Mears, *Questions Make Editors Uneasy, Lewinsky Story Poses Dilemma for High-Standard Papers*, TULSA WORLD, Apr. 5, 1998, at A9.

9. *Id.* Rowe responded with optimism, stating that the public should not expect the "new media" to aspire to high standards and that journalists with high standards have the choice to "take the high road." See *id.*

10. See Stephen G. Smith, *Letter from the Editor*, 30 NAT'L J., Apr. 18, 1998, 845, 845 (1998) (acknowledging that the newspaper failed to disclose that Stuart Taylor was offered a job with independent counsel Kenneth Starr).

11. See *id.*; Stuart Taylor, Jr., *Me and Starr: Apologies and Explanations*, 30 NAT'L J., Apr. 18, 1998, 848, 848 (1998) (explaining his situation with independent counsel Kenneth Starr and admitting that he was guilty of serious errors in judgment, but pleading innocent to any conflict of interest).

drifting over the recent performance of the press.

One of our own, Carl Bernstein, who rose to fame and fortune as a scandal-chaser for the *Washington Post* during the Watergate episode a quarter century ago, not long ago put his finger on one source of the problem now afflicting the press. "We have a culture," Bernstein said, "that exalts to some extent the weird, the coarse, the stupid, the gossip. . . . The press is a reflection of that culture and exploits it."<sup>12</sup>

What may be happening is that not only is the press reflecting that culture, it is at times actively, and perhaps wantonly, imitating it. The press, when it is honest with itself, is less and less able to distinguish between what is printed on the pages of the *New York Times* and that which appears in the *National Enquirer*, or between what can be scanned at *washingtonpost.com* and what is found at Matt Drudge's website, *The Drudge Report*.<sup>13</sup> Drudge seems to operate on the interesting premise that half-truth is better than the whole truth, especially if it makes for a better story.<sup>14</sup> It is sometimes tempting to think that some of the more scrubbed-up members of today's media let themselves down to that level. I have seen many stories in recent weeks in which the only sources for very damaging news reports were the revelations of other news organizations.<sup>15</sup> Even so highly respected a mainstream journalist as Leonard Downie, the executive editor of the

12. Jane Ann Morrison, *News Media Blasted*, LAS VEGAS REV. J., Mar. 25, 1998, at B4. Bernstein describes today's media coverage as "the triumph of idiot culture" and "the culture of journalistic titillation" and asserts that the "news of the 'weird, stupid, and coarse' has become the cultural norm." See *id.*

13. See Matt Drudge, *The Drudge Report* (visited October 21, 1998) <<http://www.drudgereport.com>>.

14. See Matt Bai, *Whispers on the Web: The Gossipy Matt Drudge Roils the Media Elite*, NEWSWEEK, Aug. 18, 1997, at 69 (stating that Matt Drudge is less than discriminating about what he publishes and admits that sometimes he is wrong, but says that "he's in the business of spreading rumors, not documented facts").

15. A few samples, from early in the media's coverage of the Lewinsky matter, illustrate what was then and what continues to be common. See, e.g., Thomas Galvin et al., *Let's Make a Deal—Monica Tells Starr She's Set to Testify*, N.Y. DAILY NEWS, Jan. 27, 1998, at 2 (writing that "the possibility of Lewinsky taking a lie-detector test to verify her assertions of an affair with the President . . . [was] first reported by CNN . . ."); *NBC Nightly News* (Jan. 29, 1998) (stating that "[a]ccording to published reports, Lewinsky tells others the following: The president suggests that she conceal their meetings by saying she would visit his secretary"); *Reuters News Wire*, Feb. 6, 1998 (commenting that "[t]oday, the news media is widely reporting the contents of White House Aide Betty Currie's grand jury testimony," which the story then related); David Willman et al., *Personal Secretary to President Goes Before Grand Jury*, L.A. TIMES, Jan. 28, 1998, at A1 ("[t]hat possibility [i.e., that a Secret Service agent or other White House staff member might have witnessed an intimate encounter], first raised by ABC News on Sunday, was widely reported but remains unconfirmed.").

Another frequently employed technique is the reprinting or rebroadcasting of allegations that had been published elsewhere, and then including in the story a refutation of the allegations by an interested source. For an example of this time-tested journalistic sleight-of-hand, see Thomas Galvin et al., *Monica Set For a Lie Test*, N.Y. DAILY NEWS, Jan. 29, 1998, at 3 ("Ginsburg disputed reports that Lewinsky kept a semen-stained dress after a sexual encounter with Clinton.").

*Washington Post*, was heard to remark:

There's abroad in the air a lot more . . . gossip. What it means is that we have to decide, more and more often, that our readers have heard so much about this from other places that if we remain silent on it we are failing in our obligation to help them understand the world around them.<sup>16</sup>

So much for independent journalistic judgment.

It is not my purpose here to catalog the specific misdeeds of the press in recent months. What I prefer to do is to give those misdeeds a generic name, and then offer an argument as to how that kind of journalism might actually influence the First Amendment jurisprudence the press must live under. Along the way, I will offer some impressions of the state of First Amendment doctrine among the present Justices of the Supreme Court, and suggest why the developing constitutional doctrine may be opening a deep pit of trouble for the press.

The name I will give to the style of journalism recently practiced around the White House sex scandals is contained within the following title: "From George Carlin to Matt Drudge: The Constitutional Implications of Bringing the Paparazzi to America." I have thrown in George Carlin for one reason only; while he is real, he is more important to us as a symbol, the fellow whose naughty twelve minute monologue—"Filthy Words"—led, unwittingly, to the development of a very interesting First Amendment theory.<sup>17</sup> And that theory is readily at hand for dealing with what I think of as the "paparazzi style"<sup>18</sup> in American journalism.

In fact, the "paparazzi style" already produced one distinctive piece of proposed legislation, the constitutionality of which may very well be determined by the First Amendment theory we trace back to George Carlin's monologue. I refer to the legislation recently introduced in the Senate explicitly addressing the paparazzi problem in America, a bill to make it a federal crime to act like a paparazzo in seeking photographs or film of news personalities. The bill is Senator Dianne Feinstein's argumentatively named proposal, the

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16. Barringer, *supra* note 7, at A20.

17. George Carlin's "Filthy Words" was the subject of contention in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). There, the Supreme Court held that indecent speech, defined as "patently offensive references to excretory and sexual organs and activities," even though protected by the First Amendment, could be sanctioned by the FCC. *See id.* at 743.

18. "Paparazzi" is the Italian plural of the word "paparazzo," which is defined as a "freelance photographer who aggressively pursues celebrities for the purpose of taking candid photographs." WEBSTER'S II NEW COLLEGE DICTIONARY 794 (1995). The word "Paparazzo" is taken from *Signor Paparazzo*, a character in Federico Fellini's movie *La Dolce Vita*. *See id.*

"Personal Privacy Protection Act."<sup>19</sup>

It is not mere coincidence, I think, that Senator Feinstein's proposal makes its entrance just as the Lewinsky scandal is occupying center stage. The "paparazzi style," it seems to me, is on display every day in the fevered media pursuit of every titillating morsel—some of which just might be true (you sometimes cannot tell)—in the Lewinsky story. I rather think that many members of the public concluded that the press finally has its brutish hands on the kind of story it always wishes for: a tawdry scandal that satisfies its appetite for the hunt, diminishing the prey it pursues, and cheapening the press even as it demeans the very nature of public discourse.

It is possible to act like paparazzi even when what we are after is news rather than news photographs: crowding noisily around a story, elbowing each other figuratively and literally, pausing too little to reflect upon the quality—or the reliability—of what we pass on as news.

That perception, though, probably did not begin with the Lewinsky story. The public saw it in the press' handling of the O.J. Simpson story.<sup>20</sup> That, too, had its "paparazzi" elements—the same incivility, the same coarse display of the manners of the huntsman. But I also think we could see it starting some years ago in what might seem to us in the press, to be a rather innocuous gesture: the shouted question from the sidelines of presidential appearances, a technique perfected by Sam Donaldson.<sup>21</sup> He would (and still does) ask those nosy questions that never really produce a whole lot of news, but surely suggest to the public how thin the line can be between abject rudeness and journalistic inquiry.<sup>22</sup> And Donaldson, of course, has legions of imitators. You could see and hear them in the morning outside the United States Courthouse in downtown Washington, D.C. where the grand jury meets and many a morning on Special Prosecutor Kenneth Starr's lawn as he leaves for work.

It is of interest to me, a reporter who is most accustomed to the well-mannered behavior of reporters inside the U.S. Supreme Court building, that any reporter would think he or she could get a mean-

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19. S. 2103, 105th Cong. (1998).

20. See M. L. Stein, *The O.J. Case and the Press*, ED. & PUB. MAG., June 25, 1994, at 81 (describing the O.J. Simpson story as "one of journalism's wildest and most bizarre episodes" and the press as "ravenous" to the extent that "anyone who might link Simpson to the murders [of his wife or her male friend] was a target for an interview attempt").

21. See James Morrison, *Dan's Still the Man*, WASH. TIMES, June 7, 1994, at A12 (stating that Sam Donaldson gained a reputation as the "junkyard dog" of journalism as ABC's former White House correspondent by shouting questions at President Ronald Reagan).

22. See Brian McGregory, *Spirits High on Bus with Clinton*, BOSTON GLOBE, Sept. 21, 1996, at A12 (noting that Sam Donaldson began shouting questions at CIA Director John Deutsch as the President and First Lady shook hands and signed autographs on Clinton's campaign trail).

ingful response to a serious legal question by asking it at the top of his or her voice, in over-simplified form, amidst a forest of mikes and cameras. The reality, of course, is that one does not, in fact, get serious answers in those settings. And I think the public can see how fruitless the pursuit actually is when one of those gang press encounters shows up on television.

And so, I suspect that no one in the public was the least bit surprised to learn that the Fox News Channel hired a team of four private investigators to follow Monica Lewinsky wherever she went, even on a trip back home to California.<sup>23</sup> Marvin Kalb, the former broadcast correspondent, now monitoring the press from Harvard University, was outraged by Fox's action. He said: "That's not journalism. It's another illustration of journalism gone mad."<sup>24</sup>

With the coming of the Wired Age, in which the electronic technology exists to universalize every news story and to globalize it in an instant, "in-your-face" journalism comes muscling its way into everyone's PC. In a word, the "paparazzi style" becomes pervasive. I ask you to keep the word "pervasive" in mind, because it is central to what is happening in the law of journalism, and that takes us back to George Carlin.

At times a raunchy comedian, Carlin made a recording about seven dirty words.<sup>25</sup> They were, he said, "the words you couldn't say on the public airwaves, the ones you definitely wouldn't say, ever."<sup>26</sup> But, of course, he said them on the public airwaves, when a Pacifica radio station in New York City broadcast the recording in the fall of 1973.<sup>27</sup> It was an "in-your-face" thing to do; Pacifica was then and is now—rather good at thumbing its nose at convention, and Carlin himself was superb at it.<sup>28</sup>

The gesture got Pacifica into trouble with the Federal Communications Commission ("FCC").<sup>29</sup> For my purposes here, what is most in-

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23. See George Rush et al., *Gossip*, N.Y. TIMES, Feb. 16, 1998, at 14 (quoting a Fox news spokesman as stating that the "Los Angeles bureau hired four private investigators to follow Monica [Lewinsky] and her attorney . . . from the airport to her father's house," but the spokesman denied that the investigators trailed Lewinsky farther than that).

24. Steve Campbell, *Eye on Washington*, PORTLAND PRESS HERALD, Mar. 1, 1998, at C1.

25. See *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (providing a transcript of Carlin's "Filthy Words" as an appendix to the opinion of the Court).

26. *Id.* at 729 (quoting Carlin's introduction of the "seven dirty words" in "Filthy Words" monologue).

27. A New York station owned by Pacifica Foundation broadcasted the "Filthy Words" monologue at two o'clock on a Tuesday afternoon. See *id.* at 729-30.

28. *Pacifica* characterized Carlin as a "significant social satirist" and argued that he was not using obscenities, but rather "using words to satirize as harmless and essentially silly our attitudes towards those words." See *id.* at 730.

29. See *id.* (referring to the declaratory order, which acknowledged the complaint against the Carlin broadcast issued by the FCC against Pacifica on Feb. 21, 1975). The FCC did not

teresting about that episode is how the Supreme Court reacted when it decided the *Pacifica* case in 1978. In *FCC v. Pacifica Foundation*,<sup>30</sup> the United States Supreme Court upheld the FCC's authority to regulate indecent speech on the air:

[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent materials presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.<sup>31</sup>

In constitutional theory, specifically the theory of the First Amendment, that is a most portentous statement. In fact, one could say it is quite radical. Never before had the Court justified government regulation of expression on the basis of the omnipresence, the ubiquitousness of media in our lives—its ability to reach its intended audience. In other words, its pervasiveness.

The potential sweep of that predicate for regulation of speech was described well by Jonathan Wallace, who coauthored the book, *Sex, Laws and Cyberspace*.<sup>32</sup> Wallace said in a recent research paper on the pervasiveness doctrine: "Ultimately, any medium could qualify as pervasive. Given the aim of a communications medium to communicate, all purveyors of media want to pervade the environments of their audiences."<sup>33</sup>

Wallace may be right, and the pervasiveness doctrine may ultimately apply in some way to every medium. It is not entirely clear, though, that the Court saw the doctrine it invented in 1978 as actually or potentially reaching that far.<sup>34</sup>

The Court did not appear to be suggesting that the mere fact that the media is commercially successful justifies its regulation by government.<sup>35</sup> We all know that making a profit does not necessarily diminish one's First Amendment protection. The Court was suggesting, indeed it was saying almost outright, that when the media

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impose any formal sanctions, but stated that the declaratory order would be placed with the station's license file.

30. 438 U.S. 726 (1978).

31. *Id.* at 748.

32. See JONATHAN D. WALLACE & MARK MANGAN, *SEX, LAWS AND CYBERSPACE: FREEDOM AND REGULATION ON THE FRONTIERS OF THE ONLINE REVOLUTION* (1966).

33. Jonathan D. Wallace, *The Specter of Pervasiveness: Pacifica, New Media, and Freedom of Speech*, CATO INST. BRIEFING PAPERS 10 (Feb. 12, 1998) (on file with *The American University Law Review*).

34. See *Pacifica*, 438 U.S. at 750 (emphasizing the narrowness of its ruling and stating that context is "all-important" when evaluating an FCC decision made under the nuisance rationale).

35. See *id.* at 744 (stating that "both the content and the context of speech are critical elements of First Amendment analysis").



achieves the capacity to intrude upon the private space of an audience to whom its message might be unwelcome, its message, if offensive enough, can be regulated.<sup>36</sup> It did not seem to matter at all to the Court that a listener who happened to stumble upon the George Carlin monologue need only have listened to it for a bare instant before being able to choose to turn the dial or turn off the switch.<sup>37</sup> By using the word "pervasive," the Court seemed to suggest that the message simply cannot be avoided without help from the government.<sup>38</sup>

For a number of years after the *Pacifica* decision, the media became lulled into thinking that the pervasiveness doctrine would not expand. For one thing, the doctrine seemed originally to be limited to radio and television because of their supposedly unique capacity to intrude into private spaces. The doctrine, however, was merely lying dormant in those ensuing years.

The doctrine sprang back to life in 1996, when the Supreme Court decided one of its first cases on the First Amendment rights of cable broadcasters, *Denver Area Educational Telecommunications Consortium v. FCC*.<sup>39</sup> Before that case, the Court had ruled on only one significant cable case, *Turner Broadcasting Systems, Inc. v. FCC (Turner I)*,<sup>40</sup> which tested the "must-carry" rule.<sup>41</sup> In 1994, the *Turner I* Court said that cable broadcasters would be entitled to more constitutional protection than radio or television broadcasters.<sup>42</sup> The Court in *Turner Broadcasting Systems, Inc. v. FCC (Turner II)*, later modified this judg-

36. See *id.* at 748 (describing the broadcast of indecent material as an intrusion into the sanctity of homes); see also *id.* at 750 (referring to the ease with which children may gain access to broadcasting).

37. See *id.* ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

38. See *id.* at 749 (likening indecent material to harassment over the telephone and asserting that role of government is to allow individuals to claim authority within their households).

39. 518 U.S. 727 (1996) (plurality opinion).

40. 512 U.S. 622 (1994) [hereinafter *Turner I*].

41. The "must-carry" rule legally obligates cable operators to carry the signals of a specified number of local broadcast television stations. See 47 U.S.C. § 534 (1998).

42. See *Turner I*, 512 U.S. at 637 (rejecting the Government's contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast (over-the-air) radio and television). The *Turner I* Court had asserted:

It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media . . . . But the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation. . . . The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. . . . [S]oon there may be no practical limitation on the number of speakers who may use the cable medium.

ment significantly.<sup>43</sup> In 1996, the Court decision in the *Denver Area* case marked the first time the Court upheld any part of a law seeking to control the content of cable programming.<sup>44</sup> Again, as in the *Pacifica* case, the decision dealt with so-called “indecent” programming.<sup>45</sup>

The *Pacifica* doctrine of pervasiveness, to the surprise of almost everyone in the media, became the key to the *Denver Area* ruling. Repeating the language the Court had used in *Pacifica* about radio and television having a “pervasive” reach into the home, Justice Stephen Breyer said, “Cable television broadcasting is as accessible to children as over-the-air broadcasting, if not more so.”<sup>46</sup> Cable, too, he said, has “established a uniquely pervasive presence in the lives of all Americans.”<sup>47</sup> Cable and broadcast, he summed up, are quite similar in terms of “how pervasive and intrusive that programming is.”<sup>48</sup> It is noteworthy that Breyer was careful to add the word “intrusive” to the concept. That inclusion, I think, illustrates more clearly what it is that bothers the Court about a “pervasive” medium of communication: its capacity to get into private spaces uninvited.

Four other Justices—John Paul Stevens (who was the author of *Pacifica*), David Souter, Sandra Day O’Connor and Anthony Kennedy—echoed Breyer’s emphasis on the character of cable television as a medium uniquely accessible in the home.<sup>49</sup>

I want to emphasize that both *Pacifica* and the *Denver Area* involved government attempts to keep indecent programming from reaching unsupervised children in the home.<sup>50</sup> That goal may well have supplied the emotional drive for the Court to create, and then to revive, the pervasiveness and intrusiveness rationale for government regulation of expression. But let us be very clear about this point: the doctrine, as an interpretation of the First Amendment’s scope is not necessarily confined to children. Children’s exposure to indecent material may be the impetus, but the doctrine is not solely a child-

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43. In spirit, if not in strict legal principle, the Court lost a good deal of that sensitivity by the time it decided *Turner II*. See *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 117 S. Ct. 1174 (1997) (upholding legislation that established the “must carry” rule).

44. See *Denver Area*, 518 U.S. at 732 (ruling that the provision allowing operators to prohibit offensive or indecent programming on leased access channels is consistent with the First Amendment).

45. See *id.* (stating that the problem the relevant provision addresses is analogous to the indecent broadcasts involved in *Pacifica*).

46. *Id.* at 744.

47. *Id.* at 744 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)).

48. *Id.* at 745 (quoting *Pacifica*, 438 U.S. at 748).

49. See *id.* at 772, 776, 779 and 791 (noting Justices Stevens, Souter, O’Connor, and Kennedy’s emphasis, respectively).

50. See *id.* at 744-45 (noting that the need to protect children from material of a sexual nature was compelling); *Pacifica*, 438 U.S. at 750 (stating that children’s easy access to broadcast material justifies special treatment of indecent broadcasting).

protection exception to the First Amendment. One cannot imagine this Court saying that expression which is so truly pervasive that it can intrude, unwanted, into the home is constitutionally acceptable so long as the only person at home is an adult. An invasion of privacy is an invasion, without regard to the age of the private individual intruded upon. It is the invasion itself that prompts the government to bring its power to bear.<sup>51</sup>

Lower courts have begun to pick up on the message of *Denver Area*, with its revival of the pervasiveness doctrine, and are applying that doctrine to other aspects of cable programming regulation.<sup>52</sup>

It is obvious where this judicial trend is heading. As the Court develops First Amendment law for each new medium, the pervasiveness doctrine is available for use on another medium. It was to be expected, therefore, that when Congress decided to regulate indecency on the Internet,<sup>53</sup> it would do so on the theory that this mode of expression is pervasive. Senator Dan Coats of Indiana was explicit about this, saying that “[t]he Internet is like taking a porn shop and putting it in the bedroom of your children . . . .”<sup>54</sup> The Justice Department, in defending the Communications Decency Act, relied explicitly upon the pervasiveness rationale.<sup>55</sup>

When the case got to the Supreme Court last year in *Reno v. ACLU*,<sup>56</sup> it produced the first ruling by the Court on the Internet and the First Amendment. The opinion seemed to be saying that the pervasiveness justification would *not* apply when the medium at issue was the Internet.<sup>57</sup> I say “seemed to be saying” because the issue is passed over very quickly and lightly in Justice Stevens’ opinion.<sup>58</sup> He said “the Internet is not as ‘invasive’ as radio or television,” because one had to take specific steps to receive Internet communications.<sup>59</sup> Internet content, he said, does not “appear on one’s computer

51. See, e.g., *Cohen v. California*, 403 U.S. 15, 21 (1971) (recognizing that government may act to prohibit intrusion into the privacy of the home of unwelcome views and ideas).

52. See *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772, 785 (D. Del. 1996) (applying the pervasiveness doctrine to legislation targeting signal “bleed,” the partial reception of video images and/or audio sounds on a scrambled channel); *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335, 1344 (N.D. Cal. 1994) (limiting application of pervasiveness doctrine to partial bans on indecent material aimed at particular populations or groups).

53. See Communications Decency Act of 1996, included in Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 1996 U.S.C.A.N. (110 Stat.) 56, 134 (1996) (to be codified at 47 U.S.C. § 223).

54. 141 CONG. REC. S8310, S8333 (1995) (statement of Sen. Coats).

55. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (discussing government reliance on *Pacific*).

56. *Id.*

57. See *id.* at 2343 (asserting that the Internet has not been subject to the same type of government regulation as the broadcast industry).

58. See *id.* at 2343-44 (differentiating the Internet from other media of expression).

59. *Id.* at 2343.

screen unbidden.”<sup>60</sup>

That decision, the press might conclude, is welcome constitutional news indeed. But let us not rely too heavily upon it. Those comments by Justice Stevens comprise only three sentences in the entire opinion. If the Court was in fact putting aside the pervasiveness rationale for regulating the Internet, one would have expected Justice Stevens to have dealt with it at greater length and depth. He would have taken the doctrine apart and explained, with more than just a summary conclusion, exactly why that doctrine cannot apply to Internet expression, taking into account the ingenuity with which software makers have gotten around “blocking” technology. We have not, one suspects, heard the last of this issue. Jonathan Wallace, whom I quoted earlier,<sup>61</sup> believes that we have not, and he foresees a time when the Internet could be treated by the courts as a pervasive medium, when it takes on more of the qualities of voice and video broadcasting, with information going out from single originating sources to wide audiences—more of the qualities, in other words, of mass media. There is very little in the Court’s Internet ruling last year to prove Wallace forever wrong on that point. We should remember what happened to cable. In the space of three short years, it went—in the Supreme Court’s eyes—from a medium of expression almost as fully protected as the print press, to close governmental oversight.<sup>62</sup> When the Court upheld the must-carry rules in 1997, cable found itself far less free than it felt after the original *Turner I* ruling in 1994.

For the print media as well as for cable—and perhaps for the Internet some day—the pervasiveness doctrine stands at least as a potential threat. To be sure, the Court has never used that theory, and to my knowledge has not been seriously asked to use it, to justify governmental regulation of print communication.<sup>63</sup> The more the print media goes on line, however, the more there is a convergence in communications technologies and the greater the possibility that constitutional rules developed for the electronic media will be con-

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60. *Id.*

61. See Wallace, *supra* note 33, at 10.

62. See *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 741 (1996) (holding that the government may regulate speech so long as the regulation is appropriately tailored to address an extraordinary problem); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 623 (1994) (finding the appropriate standard of review to be intermediate scrutiny, not strict scrutiny); *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772, 790 (D. Del. 1996) (holding that Section 505 of the Communications Decency Act of 1996 regulating cable signal “bleed” is justified given the special characteristics of such material).

63. See *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 376 (1969) (introducing the scarcity rationale, which was the sole basis for applying print-style protection until *Pacifica Found. v. FCC*, 438 U.S. 726 (1978)).

sidered appropriate for the print medium, as well.

It should be noted that the print press has not stood apart from the behaviors that suggest the paparazzi influence is taking hold in American journalism. In fact, Senator Feinstein's anti-paparazzi legislation is not confined only to paparazzi carrying television cameras.<sup>64</sup> The present reality is that the print media wants to keep up with the electronic Joneses in covering the high-profile stories, and print is contributing to the universalizing of those stories through its own websites, toward making them pervasive, if you will. As we all know from reading even our highest quality newspapers, listening to the best broadcast outlets, or scanning their websites, sexual imagery and expression is very often intermixed with the daily or even hourly news.

An unsuspecting citizen—even one still in adolescent years—might well encounter quite graphic depictions in places other than explicitly cybersex sites. The Court may have been at least partly wrong last year in the Internet decision in suggesting that users “seldom encounter content by accident.”<sup>65</sup> What kind of blocking software does one use to avoid the accident of seeing unwelcome sexual content when the search engine is used to scan for information about, say, the American presidency?

With journalistic bombast adding to the din of information that intrudes regularly upon private space, there is every reason to think that the desire to regulate it will grow, not lessen, in coming years. If the public—and, in turn, the policymakers and lawmakers—increasingly find journalism to be both offensive and intrusive, one can hardly expect *nothing* to happen in the law.

Another analytical path is worth traversing briefly. So far, the discussion has been largely about the use of the pervasiveness doctrine when the medium or the message becomes intrusive or invasive into private spaces. But is it a certainty that the doctrine will have no application to the *techniques* of news-gathering? I already suggested that the pervasiveness doctrine may be the key to whether Senator Feinstein's anti-paparazzi bill would pass constitutional muster.<sup>66</sup>

Recall that the Supreme Court extended the First Amendment, at least to a limited degree, to the process of gathering the news. In

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64. See Personal Privacy Protection Act, S. 2103 § 3(a), 105th Cong. (1998) (applying the proposal to “visual or auditory recording instrument[s]”); see also *supra* text accompanying note 19 (describing possible motivations behind Sen. Feinstein's proposed legislation).

65. See *Reno v. ACLU*, 117 S. Ct. 2329, 2343 (1997).

66. See S. 2103, 105th Cong. (1998) (suggesting that “[f]ederal legislation is necessary to prohibit . . . trespass using intrusive visual or auditory enhancement devices for commercial purposes”).

1972, in *Branzburg v. Hayes*,<sup>67</sup> the Supreme Court stated that "without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>68</sup> If pervasiveness is now an established part of First Amendment doctrine, and it surely seems to be, it is foolhardy to assume that it will never play a part in determining the degree of protection for intrusive news-gathering techniques. Monica Lewinsky's former lawyer, William Ginsburg, might well have some pertinent thoughts on that point. Because we have brought the paparazzi to America, and put them to work covering the White House sex scandals and others of that *genre*, perhaps we should be prepared for the constitutional consequences.

One final inquiry: Is there some judicial savior available to rescue the press from the recent trend toward First Amendment law that is not to its liking? There is not; there is no William Brennan, no William Douglas, no Hugo Black, now on the Court, to champion free expression and to fight constantly against its regulation.

The media as a whole, electronic and non-electronic, cannot really have any confidence that the present Supreme Court justices will protect expression to the fullest. That is why, for example, the press should not conclude that the Internet decision last year was a ticket for safe passage for cybercommunication.

The First Amendment jurisprudence that emerged from these justices, and is likely to continue to emerge, is far from orderly, far from carefully thought-out, and far from being predictably protective of expression. The Court's dominant justices, in this area as in so many others, are highly pragmatic, and almost never dogmatic, even in a benign sense.

Justice Breyer is probably the most pragmatic; he is interested in allowing the other branches of government a wide range of discretion to deal with the modern problems that those branches perceive, in communication as in other areas. When he replaced Justice Harry Blackmun, the Court lost a strong vote for First Amendment protection. In fact, the Court seems to have turned around its perceptions about cable operators' rights as a direct result of Justice Breyer's replacement of Justice Blackmun.<sup>69</sup>

Justice O'Connor, who until quite recently seemed to be a cham-

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67. 408 U.S. 665 (1972).

68. *Id.* at 681.

69. Justice Harry A. Blackmun, on the Court when *Turner I* was decided, fully supported the generous remarks made by the Court there about First Amendment protection for cable. By the time of *Turner II*, he had been replaced by Justice Stephen Breyer, who was quite willing to apply a somewhat flaccid balancing test that worked against cable operators' freedom of expression. As Justice Blackmun's vote was decisive in *Turner I*, a 5-4 ruling, so was Justice Breyer's when *Turner II* was decided 5-4.

pion of cable's rights, perhaps has cooled her support for the medium.<sup>70</sup> The same thing has happened, regarding cable, with Justice Kennedy, who had appeared for a few years to be emerging as a strong defender of First Amendment freedoms.<sup>71</sup> It is also worth noting that Justice O'Connor, alone with Chief Justice William Rehnquist, voted to uphold some parts of the attempted regulation of the Internet.<sup>72</sup>

Justice Stevens, the author of *Pacifica*, tends to be quite unpredictable—in this area as in virtually all other areas of law. It is not clear how far he has moved away from *Pacifica*, if indeed he has, and it certainly is not clear that he has abandoned the pervasiveness doctrine.

Justices Ginsburg and Souter seem quite tentative—cautious, even—in developing their own First Amendment views. Justice Souter once said that, if the Court moved too rapidly to develop constitutional rules for new modes of expression, it probably would get them wrong.<sup>73</sup> He seems to want to be an incrementalist, and Justice Ginsburg appears to share that inclination.<sup>74</sup>

And that brings us to Justices Scalia and Thomas. Some of the time, their libertarian instincts seem to be leading them toward a

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70. In *Turner I*, Justice O'Connor argued forcefully that legislation restraining cable operators' editorial discretion was an unconstitutional form of content regulation. See *Turner I*, 512 U.S. at 681 (O'Connor, J., concurring in part, dissenting in part). Two years later, when the Court confronted legislation on indecency in cable programming, O'Connor, demonstrating concern for children who might have access to such programming, voted to sustain part of that legislation. See *Denver Area Telecomms. Consortium v. FCC*, 518 U.S. 727, 779 (1996). In *Turner II*, she again protested what she called "the wrong analytical framework" adopted in *Turner I*. See *Turner II*, 117 S. Ct. at 1205. Justice O'Connor also said she would strike down the "must-carry" rule for failing a strict scrutiny framework, see *id.* at 416, but her dissent lacked the fervor of her writing in *Turner I*.

71. Justice Kennedy has consistently supported free expression, manifested perhaps most clearly in his vote in the emotionally charged flag burning cases. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). Similar support, when it comes to the cable operators' rights, was evident in his plurality opinion for the Court in *Turner I*, and, again in his dissent in *Denver Area*, in which he argued, in dissent, that he would invalidate all three provisions of the cable indecency law at issue there. See *Denver Area*, 518 U.S. at 780. But his positions in *Turner I* and *Turner II* do not seem wholly consistent with a keen concern about free expression on cable.

72. *Reno v. ACLU*, 117 S. Ct. 2329, 2351-57 (1997).

73. In *Denver Area*, Justice Souter wrote, "In my own ignorance I have to accept the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace . . . we would get it fundamentally wrong.'" 518 U.S. at 777 (Souter, J., concurring) (citing Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995)).

74. Justice Ginsburg voted both in *Turner I* and *Turner II* to find the "must carry" legislation unconstitutional. Although joining Justice O'Connor's dissent in *Turner I*, she wrote separately—and tepidly—in that case, relying largely upon a lower court judge's rationale, see *Turner I*, 512 U.S. at 685-86, and she did not speak out separately in *Turner II*. She was also content in *Denver Area* simply to join Justice Kennedy's moderately worded dissent, which argued for invalidation of all three provisions of the law at issue. Justice Kennedy, with Justice Ginsburg's support, complained more about a lack of First Amendment standards than about the intrusion upon cable expression. See *Denver Area*, 518 U.S. at 784-87 (Kennedy, J., concurring in part, concurring in judgment, dissenting in part).

strong skepticism of government regulation of expression.<sup>75</sup> At other times, their innate institutional conservatism seems to lead them toward a more trusting attitude toward government regulation; they joined fully in the ruling to strike down the Internet regulations,<sup>76</sup> but they also voted to uphold all parts of the regulation of indecency in cable programming.<sup>77</sup> Justice Thomas also wrote that “[t]he text of the First Amendment makes no distinction between print, broadcast, and cable media.”<sup>78</sup> Now, that could be a clarion call for freedom of expression, or it could be an invitation to judicial mischief; we will have to wait and see.

There is another factor, a quite subtle one, that may work upon the justices’ attitudes about press freedom, especially if the press’ aggressive behavior becomes even more prevalent than it is at present. Each of the justices has witnessed, first-hand, what has happened as the press developed a symbiotic relationship with advocacy organizations, which have become the challengers of judicial nominations—the “Bork phenomenon” that now seems to surround each judicial selection.<sup>79</sup>

The press’ role in the changed confirmation process, in fact, has developed some of the character of the hunt, the paparazzi posse, that is seen in other sectors of journalism. The experience of Justice Thomas is well known to his colleagues, whether or not they have concluded who was right or wrong in that fight.<sup>80</sup> To some degree, it has made each of them more wary of the press, and more skeptical. Justice Thomas’ experience, the less threatening but still uncomfortable experiences of some of the others in their own nomination pro-

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75. Justices Thomas and Scalia joined fully in striking down Congress’ restrictions on indecency in the Communications Decency Act, see *Reno v. ACLU*, 117 S. Ct. at 2351. They also argued in *Denver Area* that all private speakers should be free to choose their preferred expression, without being forced by the government to utter someone else’s favored message. See *Denver Area*, 518 U.S. at 820-23. Justice Scalia, joined by Justice Thomas, also manifested this skepticism in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). And Scalia did so in the flag-burning cases, *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990).

76. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

77. See *Denver Area*, 518 U.S. at 812 (Thomas, J., concurring).

78. *Id.*

79. The “Bork phenomenon” refers to the contentious and failed judicial nomination of Judge Robert K. Bork. “Since Judge Bork’s high court nomination was rejected after contentious Senate Judiciary Committee hearings . . . the process has grown increasingly political, with grass-roots efforts to bring down any nominee perceived to be too far right or left.” Nancy E. Roman, *Process May Lead Court to Center*, WASH. TIMES, June 16, 1993, at A3 (discussing judicial nomination of Ruth Bader Ginsburg); see also Richard L. Berke, *Judge Thomas Faces Bruising Battle With Liberals Over Stand on Rights*, N.Y. TIMES, July 4, 1991, at A12 (discussing the contentious nomination hearing of Judge Clarence Thomas).

80. See generally Nina Totenberg, *Two Versions of Truth; Compelling “Justice” Favors Hill’s Side of Confirmation*, CHI. SUN TIMES, Nov. 26, 1994, at 200 (discussing books that attempt to unravel Anita Hill’s allegations of sexual harassment by Justice Clarence Thomas).



ceedings, and their full awareness of the behavior of the press in the O.J. Simpson case are hidden factors contributing to the Court's continued unwillingness to open its own proceedings to television cameras.<sup>81</sup> The justices are very leery of becoming press commodities because they believe they know what that means to the loss of their privacy—and, perhaps, to their dignity.

Civility, in short, counts very highly with the justices on the Supreme Court. And as they make First Amendment law, it is not a quality that they see in abundance in American journalism today.<sup>82</sup> This lack of civility just may make a constitutional difference to them—and to the press of today, and of the future.

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81. See generally *Progress on Courtroom Cameras*, N.Y. TIMES, Mar. 14, 1996, at A22 (reporting that a 14-12 vote by the Judicial Conference of the United States to give federal appellate courts the option to televise proceedings represents potential constitutional challenge against Supreme Court refusal to broadcast oral arguments and Federal Rule of Criminal Procedure barring electronic coverage of judicial proceedings).

82. See generally *supra* note 79 (discussing the "Bork phenomenon" and the media's treatment of recent judicial nominations).

